No. 86-1355

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

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STATE OF MINNESOTA,
CITY OF MANKATO,

Respondent.

vs.

RICHARD ANTHONY CHIRPICH,

Petitioner,

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# PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

## QUESTIONS PRESENTED

1. Did Chirpich challenge the constitutionality of Minnesota Statutes section 169.121 in time to preserve his federal rights?

2. Did the Minnesota legislature, by passing Minnesota Statutes section 169.121, subdivision 1(e), cross the forbidden line drawn by the 14th Amendment and violate Chirpich's due process rights by using an irrational and arbitrary irrebuttable presumption?

3. Does the use of an irrebuttable presumption to establish guilt under subdivision 1(e) operate to shift the ultimate burden of proof from the state to the defendant?

## LIST OF PARTIES

The parties to the proceeding below were Defendant-Petitioner Richard Anthony Chirpich, the named Petitioner before this Court; and State of Minnesota by the City of Mankato, Respondent.

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PETITION FOR A WRIT OF CERTIORARI
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Richard Anthony Chirpich, the Petitioner, asks this Court to issue a Writ of Certiorari to the Supreme Court of Minnesota to reverse the decision of the Minnesota Court of Appeals against him. The decision of the Court of Appeals was published in an opinion dated

October 17, 1986. This decision was appealed, but in an Order by the Minnesota Supreme Court filed on November 3, 1986, review was denied. Copies of both the decision and the order are in the Appendix to this Petition.

## OPINIONS BELOW

The Court of Appeals opinion is reported at 392 N.W.2d 34 (Minn. Ct. App. 1986), slip op. at Appendix A-25.

## JURISDICTIONAL GROUNDS

The judgment of the Minnesota Supreme Court was entered on November 3, 1986. This Petition for a Writ of Certiorari was filed within sixty (60) days of that judgment.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257 (3) (1982).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, reads as follows:

> Section 1 *** Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTES INVOLVED

Because of the number and length of provisions of Minnesota Statutes section 169.121, excerpts of the applicable provisions are provided in the Appendix A-1.

Minnesota Statutes section 169.121, subdivision 1(e), reads as follows:

> 169.121 MOTOR VEHICLE DRIVERS UNDER THE INFLUENCE OF ALCOHOL OR CONTROLLED SUBSTANCE.
> Subdivision 1. Crime. It is a misdemeanor for any person to drive, operate or be in physical control of any motor vehicle within this state:
> ***
> (e) When the person's alcohol concentration is measured within two hours of the time of driving is 0.10 or more.

Minnesota Rules of Criminal Procedure. Rule 11.04 of the Minnesota Rules of Criminal Procedure is reproduced in full at Appendix A-7.

## STATEMENT OF THE CASE: PROCEDURAL

Chirpich was charged with a gross misdemeanor under Minnesota Statutes section 169.121, subdivision 3(a) (1984). The case, however, was tried as a misdemeanor. The lawyers agreed before trial that the conviction would automatically become a gross misdemeanor if the jury found against Chirpich. The State charged Chirpich with violating Minnesota Statutes section 169.121, subdivisions 1(a), 1(d), and 1(e) (1984).

At trial, the challenge to the constitutionality of Minnesota Statutes section 169.121, subdivision 1(e), was brought to the attention of the Court by Chirpich at the close of all the evidence. The issue of the submission of a charge under Minnesota Statutes section 169.121, subdivision 1(e), to the jury and its constitutionality was argued to the Court and decided on the merits. At no time during the trial of this matter did the prosecution object to the timeliness of this issue or to its disposition on the merits.

The jury came back with verdicts of not guilty of the charge of driving under the influence, 169.121, subdivision 1(a); not guilty of having a blood-alcohol concentration of greater than .10 at the time of driving, 169.121, subdivision 1(d); and guilty of having a blood-alcohol concentration greater than .10 within two hours of driving, 169.121, subdivision 1(e).

Chirpich appealed his conviction for violation of Minnesota Statutes section 169.121, subdivision 1(e) (1984), and the trial judge's subsequent denial of his motions for new trial, vacation of judgment, or judgment of acquittal, to the Court of Appeals. The Court of Appeals affirmed the Trial Court's decision on August 6, 1986.

This decision was appealed to the Minnesota Supreme Court which declined to review the case.

STATEMENT OF THE CASE: FACTS

Chirpich had been out with friends on the evening of March 12, 1985. He had been

drinking during the evening. He had his last drink and left a bar sometime after 1:00 a.m. and drove a friend home and then stopped at another friend's house for a short while. Around 2:00 a.m., while driving home, he was stopped by Officer Kluver of the Mankato Police Department. The reason given for the stop was that one of Chirpich's headlights was out. When questioned by Officer Kluver, Chirpich admitted to drinking and readily consented to performing a heel-to-toe walking the line field sobriety test. After his arrest, he agreed to submit to a chemical breath test on an Intoxilyzer 5000 machine, videotaping of him doing agility tests, and answering questions. The breath sample was taken at 3:00 a.m. and showed a blood-alcohol level of .12. At trial, the jury refused to convict Chirpich of the charge under Minnesota Statutes section 169.121, subdivision 1(d), which would have required a finding that at the time of driving his blood-alcohol level was .10 or greater. This conclusion is

confirmed by the testimony of Police Sergeant Schweiss who testified that Chirpich appeared normal. Three other witnesses who had been with him prior to the stop also testified that he acted normally before and after the arrest. Kluever testified that there was no erratic or dangerous driving involved in the stop; that Chirpich was polite and cooperative; neither did he have blood-shot eyes nor slurred speech. In short, none of the usual signs of intoxication were present at the time of the stop. Kluever's determination to arrest was based on his smelling a beery odor on Chirpich's breath and on watching him misstep once after turning while he was doing the heel-to-toe walk on a dark sidewalk with no line marked. No other agility tests were offered until Chirpich was taken to the Law Enforcement Center under arrest and videotaped. During videotaping he successfully performed all the tests given, including the heel-to-toe walk. Chirpich testified that he did not feel intoxicated

when he was driving and believed he was within the legal limits for driving after consuming alcohol.

## REASONS FOR GRANTING THE WRIT

### I.

### CHIRPICH OBJECTED TO THE UNCONSTITUTIONALITY OF MINNESOTA STATUTES SECTION 169.121, SUBDIVISION 1(E), IN TIME TO PRESERVE HIS FEDERAL RIGHTS.

The Minnesota Court of Appeals held that the issue of the constitutionality of Minnesota Statutes section 169.121, subdivision 1(e), was not raised in time and disposed of the appeal on that ground.

This holding creates a dangerous precedent in regard to the review of federal rights. The issue is to what extent do local formalities control the presentation and preservation of federal rights. This decision directly impacts this Court's ability to oversee the administration of federal rights by Minnesota State Courts.

The particular objection at issue to Minnesota Statutes section 169.121,

subdivision 1(e) was inadvertantly not raised at the pretrial hearing. Rule 11.04 of the Minnesota Rules of Criminal Procedure provides that constitutional objections are preferably to be raised at the pretrial hearing (A-8). This oversight was corrected by counsel at trial by objecting on the record after the presentation of all the evidence to the jury but before submission of the case to the jury for decision.

The rule of law in this area was clearly stated in Coleman v. State of Alabama, 377 U.S. 129 (1964) and in Henry v. Mississippi, 379 U.S. 443 (1964), rehearing denied, 380 U.S. 926 (1965).

In Coleman the constitutional objection was held to be timely raised when brought for the first time in post trial motions. In Henry this Court held that the assertion of the constitutional issue during trial, without contemporaneous objection to the tainted evidence was timely. The Court reasoned that since the State's interest in avoiding delay

and waste of time in the disposition of the case was served by objections at the close of the State's case and again at the close of all the evidence, the formalities did not control. If there is a plain assertion of federal rights in the lower courts, the local rules on how far it shall be reviewed do not necessarily prevail.[1]

The local procedural formalities do not control the review of federal rights where (1) there is no substantial prejudice to the State's case by delay or waste of time resulting from timing of the objection, (2) the timing of the objection is not the result of a strategic choice for trial

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[1] See also District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 483 n. 16, (1983), (summarizing this area of the law). This position was adopted by the Minnesota Supreme Court in State v. Tahash, ___ Minn. ___, 141 N.W.2d 3 (1966), holding that where at trial the attention of the court is directed to a claim of constitutional infringement the time and form of objection should be disregarded.

purposes, and (3) the objection is presented to the trial court at a time in the proceeding when it can rule.

In this case, at trial, the timing of the motion was not prejudicial to the State since the charges against defendant under Minnesota Statutes section 169.121, subdivisions 1(d) and 1(e) require proof of the same facts, i.e. (1) driving, (2) the time and location of driving, (3) a chemical test with a result of .10 or greater, and (4) the time of taking the test. Furthermore, objection was made at the close of all the evidence when the facts most favorable to the State were already presented to the jury. The timing of this objection was more prejudicial to the defendant than to the State.

The issue of timeliness is a red herring that was raised for the first time by the State in the second post trial hearing on Chirpich's motions challenging his conviction. During trial when the issue was

initially raised and decided, the prosecution neither mentioned untimeliness nor any other objection to the Defendant's motion. Instead, the prosecution argued the motion on its merits and won. A record was made as to the charge to be submitted to the jury (A-20 through A-21). No objection was made by the State as to timeliness (A-21). The motion was decided on the merits (A-21, A-22, and A-23).

This is the most elementary kind of waiver of an objection by the prosecution. By not raising the issue at trial, the State lost the right to assert it.

The decision of the lower Court should be overturned because it conflicts with the long standing precedents of this Court regarding the preservation of federal rights.

The constitutionality issue was raised at trial at the close of all the evidence. The motion was argued and decided on its merits at trial. The interest of the State in avoiding multiple hearings and conserving time and legal resources was not prejudiced. The

objection was timely under the circumstances. The defendant should have his opportunity to have his substantive federal rights heard and determined.

II.

MINNESOTA STATUTES SECTION 169.121, SUBDIVISION 1(E), IS AN UNFAIR LAW BECAUSE IT USES AN ARBITRARY AND IRRATIONAL PRESUMPTION TO ESTABLISH GUILT.

Driving while intoxicated in Minnesota is defined as the act of driving a motor vehicle while the driver is in a particular physiological condition of intoxication produced by alcohol or a controlled substance or a combination of the two. State v. Duemke, 352 N.W.2d 427 (Minn. App. 1984). The forbidden conduct of driving while under the influence is made up of two fact elements that must co-exist in the same time frame, (a) driving and (b) in a particular physiological condition.

On its face, Minnesota Statutes section 169.121, subdivision 1(e), doesn't relate back the bodily condition of intoxication to the

same time as the driving. How are the two facts connected?

The connection can only be made by an assumption of fact or presumption that the prohibited physical condition did in fact exist at the time of driving. The chemical test results are presumed to relate back to the time of driving and are presumed to show a prior illegal intoxicated condition. Such a presumption must be rational and not arbitrary in order to be upheld. Leary v. United States, 395 U.S. 6 (1969).

Is the presumption not arbitrary and rational? The Statute uses a chemical test of blood-alcohol concentration (BAC). Assuming no consumption of alcohol between the time of driving and the time of testing, the BAC taken within two hours of driving must relate back to the BAC at the time of driving in order to make any sense.

That this must be the case can be inferred from the nature of the only statutory defense to the crime, consumption of an

alcoholic beverage between the time of driving and the time of the test, set out in Minnesota Statutes section 169.121, subdivision 2(b) (A-2 and A-3). If the test result doesn't relate back to the time of driving then the statutory defense makes no sense. Since the defense was specifically drafted into the statute then it is a clear indication that the test result was meant by the legislature to relate back to the time of driving.

Since the test result of BAC must be related back to the time of driving, what is the nature of the presumption that is used to prove guilt?

The implicit presumption of the statute must be that if a driver has a blood-alcohol concentration of over .10 within two hours of driving, then the driver must have had a criminally high BAC of over .10 at the time of driving.

To be logical and rational, this presumption must be supported by facts so that it represents a substantial probability. It

is well recognized scientific fact that BAC is a variable that depends upon many factors. The level of BAC in any given person varies from time to time as alcohol is either being absorbed into or eliminated from the body after consumption. If the absorbtion phase is in process the BAC goes up. If the elimination phase is in process then BAC goes down.

Without the development of facts regarding absorption and elimination of the alcohol from the blood by the prosecution, the connection between the later BAC test result and the earlier driving conduct becomes a matter of some speculation. It is impossible to tell from a single chemical test whether or not BAC is rising or falling. The statute does not allow for situations when the driver has a rising BAC at the time of testing, absorption not being complete for a variety of reasons, e.g., a stomach full of heavy food.

The problem presented by reliance upon a single test of BAC as conclusive evidence of

guilt without reference to whether or not the alcohol has been completely absorbed into the blood has received considerable attention in legal and scientific literature.[3]

When a driver is charged with violating the 1(e) provision, it is no defense to the charge that the BAC at the time of driving is under 0.10. Guilt is established merely by showing a chemical test result in excess of 0.10 within two hours after driving.

Minnesota Statutes section 169.121, subdivision 2, provides that (a) BAC of 0.05 or less is prima facie evidence that the person is not under the influence and (b) BAC greater than 0.05 and less than 0.10 is relevant evidence as to whether or not the person is under the influence.

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[3] See generally, R. Erwin, 1 Defense of Drunk Driving Cases, chs. 14 - 16 (3d ed. 1985). The BAC is not invariably or consistently higher at the time of driving than shown by a later BAC test.

BAC of less than 0.10 at the time of driving is only relevant evidence of intoxication and is not the basis for a conclusive presumption of guilt, c.f. Minnesota Statutes section 169.121, subdivision 1(d). (BAC of 0.10 or more at the time of driving is illegal per se.)

The only way to harmonize subdivision 1(e) and subdivision 2 is to conclude that subdivision 1(e) refers back to a BAC of 0.10 or greater at the time of driving and thus is a per se statute. Otherwise a BAC, which under subdivision 2 is merely relevant evidence at best, becomes presumptive of guilt under subdivision 1(e) if the BAC continues to rise over .10 after the time of driving but was under .10 at the time of driving.

The presumption embodied in the statute works as a logical presumption for those defendants who are in the elimination phase while they are driving because the BAC at driving will always be higher than that BAC after driving. It will also work fairly for

drivers who are still in the absorbtion stage at the time of driving, if the BAC taken after driving is sufficiently high and taken soon enough after driving to make the inference that the BAC at driving must have been in excess of 0.10.

The class of drivers for whom the statute works an injustice are those who are still in the absorption stage at driving and have a low BAC after driving, e.g., 0.12, the inference being that the BAC at the time of driving would be under 0.10 increasing to greater than 0.10 after the driving conduct.

In the case of low BAC, e.g., .10, .11, .12, taken after driving, conviction based upon the presumption that the BAC was higher at the time of driving is arbitrary for this class of drivers.

Chirpich falls in the latter class and the testimony developed at trial supports this conclusion. Although the jury acquitted him of the charge of having a BAC of 0.10 or greater at the time of driving, it proved to

be no defense to the subd. 1(e) charge on which he was convicted.

It should be noted parenthetically that a comparison of the facts recited in the Court of Appeals opinion and with those appearing in the trial transcript, relevant pages of which are included in the Appendix to this Petition, demonstrates several factual discrepencies. The Court noted that the officer observed several indications of intoxication (A-26). In fact, the officer made only two observations, breath odor and a single misstep while walking the line (A-9, A-10, and A-19). Cross-examination of the officer showed a lack of the ordinary signs of intoxication, e.g., blood-shot eyes, slurred speech, etc., prior to the arrest, (A-12 and A-13).

In fact, the preponderance of testimony at trial was that the defendant appeared and acted normally (A-14, A-15, A-16, A-17, and A-18).

The Minnesota Court of Appeals stated that the officer had appellant perform certain

field sobriety tests which appellant failed (A-26/27). In fact, only one test was offered and performed (A-10 and A-11). The Minnesota Court of Appeals then went outside of the trial record to state that the officer administered a preliminary breath test which appellant also failed (A-27). There is no reference to such a test in the trial record. Such a test is not admissible evidence at trial by the prosecution. There is no way to establish the accuracy of a breath test as a practical matter. The devise used can be quite inaccurate. Mere reference by the prosecution to this rough screening procedure during trial in front of the jury is grounds for a mistrial.

So how does the subdivision 1(e) work unfairly? First, it does not take into consideration whether the BAC is rising or falling. Second, it is no defense that the BAC would be under 0.10 at the time of driving.

## III.

MINNESOTA STATUTES SECTION 169.121, SUBDIVISION 1(E) (1984) VIOLATES DEFENDANT'S CONSTITUTIONAL DUE PROCESS RIGHTS BY ACTING AS AN IRREBUTTABLE PRESUMPTION OF GUILT, THUS IMPERMISSIBLY SHIFTING THE STAT'S BURDEN OF PROOF TO THE DEFENDANT.

The third problem with the statute in question is that it permits convictions on an implicit irrebuttable presumption or legal fiction. A conclusive presumption of driving under the influence based merely upon the fact of driving and of a BAC of .10 or greater within two hours, whether explicit or implicit, violates the Defendant's constitutional due process rights and is grounds for a reversal of a conviction based on it. The effect of such a presumption is to shift the burden of proving each and every element of a crime beyond a reasonable doubt. Such conclusive presumptions are invalid. Morrissette v. United States, 342 U.S. 246 (1952). In Morrissette, the Court stated that:

> A presumption which would permit the jury to make an assumption which all the evidence considered does not logically establish would give to a proven fact an artificial and fictional effect. In either case this presumption would conflict with the overriding presumption of innocence which the law endows the accused and which extends to every element of the crime.

Id. at 274-275. Accord, see United States v. United States Gypsum Co., 438 U.S. 422 (1968) (conclusive presumption of guilt of intent to price fix inferred from ordinary acts); Hickory v. United States, 160 U.S. 408, 422 (1895) (presumption of guilt of murder based on concealment and flight from scene); Mullaney v. Wilbur, 421 U.S. 684 (1975) (requirement of proof by defendant to mitigate severity of offense); Sandstrom v. Montana, 422 U.S. 510 (1979) (presumption of intent based on ordinary consequences of voluntary acts). The due process clause of the United States Constitution Amendment XIV requires proof of each and every element of a crime beyond a reasonable doubt. See Re Winship, 397 U.S. 358 (1970).

As the statute now reads the state obtains the benefit of an irrational and arbitrary circumstantial presumption of fact regarding Chirpich's BAC at the time of driving. This presumption is not rebuttable by showing that the defendants BAC was less than .10 at the time of driving. This operates to impermissibly shift the burden of proof to the defendant and as such should be declared invalid.

## CONCLUSION

Chirpich did object in time under the circumstances of this case to preserve his federal rights.

Minnesota Statutes section 169.121, subdivision 1(e) operates to unfairly infringe upon the defendant's due process rights under the Fourteenth Amendment. It uses an irrebuttable presumption to convict. This presumption is arbitrary and irrational. It is no defense to show that the blood-alcohol concentration was under 0.10 at the time of driving. This is fundamentally unfair. If blood-alcohol concentration is to be used as

the criteria of guilt then the State should have to prove that the BAC is 0.10 or more at the time of driving without the benefit of arbitrary presumptions. The subdivision 1(e) law gives the State the benefit of the doubt, and lets the State win convictions using an unspoken presumption effectively shifting the burden of proof to the defendant. The decision below should be reversed and the Statute be declared unconstitutional.

Respectfully submitted,

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Minnesota Statutes

Section 169.11 HIGHWAYS; ROADS

***

Section 169.121. Motor vehicle drivers under influence of alcohol or controlled substance

Subdivision 1. Crime. It is a misdemeanor for any person to drive, operate or be in physical control of any motor vehicle within this state or upon the ice of any boundary water of this state:

***

***

(e) when the person's alcohol concentration as measured within two hours of the time of driving is 0.10 or more.

***

Subd. 2. Evidence.

(b) If proven by a preponderance of the evidence, it shall be an affirmative defense to a violation of subdivision 1, clause (e) that the defendant consumed a sufficient quantity of alcohol after the time of actual driving, operating, or physical control of a motor vehicle and before the administration of the evidentiary test to cause the defendant's alcohol concentration to exceed 0.10. Provided, that this evidence may not be

admitted unless notice is given to the prosecution prior to the omnibus or pretrial hearing in this matter.

***

Subd. 3. Criminal penalties.

***

The following persons are guilty of a gross misdemeanor:

(a) A person who violates this section or an ordinance in conformity with it within five years of a prior conviction under this section, section 169.121,

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***

Subd. 6. Preliminary screening test.

***

The results of this preliminary screening test shall be used for the purpose of deciding whether an arrest should be made and whether to require the tests authorized in section 169.123, but shall not be used in any court action except to prove that a test was properly required of a person pursuant to section 169.123, subdivision 2.

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PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

Minnesota

Rule 10.04 RULES OF CRIMINAL PROCEDURE

***

Rule 11. OMNIBUS HEARING IN FELONY AND GROSS MISDEMEANOR CASES

If the defendant does not plead guilty at his initial appearance before the district court following a complaint, a hearing shall be held as follows:

***

Rule 11.04. Other Issues

The court shall ascertain any other constitutional, evidentiary, procedural or other issues that may be heard or disposed of before trial and such other matters as will promote a fair and expeditious trial, and shall hear and determine them, or continue the hearing for that purpose.

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***

6 - Q And once in the squad car with the
6 - defendant did you
7 - observe anything?
8 - A Yes, I did.
9 - Q What was that?
10 - A Well, as he was seated in the squad
10 - car with me I
11 - observed an odor of alcohol about his
11 - breath.
12 - Q Did you inform the defendant of that?
13 - A Yes I did.
14 - Q And having informed the defendant did
14 - he say anything to
15 - you?
16 - A Yes, he did.
17 - Q Will you tell the jury what he said?
18 - A He told me that he had been out

---

18 - drinking that night.

***

24 - Q Did you then ask the defendant to
24 - perform any kind of
25 - test?

---

A Yes, I did.
Q And what kind of test was that?
A It would have been a field sobriety test which is walking heel-to-toe with his arms extended out from his body.
Q Did you demonstrate that the test for him prior to his doing it?
A Yes, I did.
Q What was the surface like? The Roadway? What surfaces did he perform the test on?
A Well, it would have been the alleyway that runs alongside the Library and it was a blacktop roadway.
Q Now, this was in March, is that correct?

---

13 - A That's correct.
14 - Q Was there any snow on the ground?
15 - A As I recall, yes, there was snow on
15 - the ground. But
16 - there was not any snow where we were
16 - or where I had him
17 - doing the test.
18 - Q And how did he perform on that test?
19 - A Well, I did observe as he was
19 - performing this test that
20 - he --- what I have them do is I have
20 - the person walk
21 - away from me several steps and then I
21 - have him turn
22 - around and walk back heel-to-toe. And
22 - I observed that
23 - as he turned around and began walking
23 - back towards me
24 - that he stumbled and lost his balance.

---

24 - And I stopped
25 - him then at that point and asked him
25 - to come back to

the squad car again.
Q Now, are there other tests that you could have asked the defendant to do?
A Yes, there are.
Q And why didn't you in this case?
A Well, I felt at that point that I really did not need to pursue it any further. I did not need to offer him any more field sobriety tests.
Q So what is the purpose of initially offering the field sobriety test?
A Well, to get a gauge or a feel for what his balance or coordination is.
Q And having observed the defendant do the one field

---

14 - sobriety test you felt that you had in
14 - fact had that
15 - gauge?
16 - A I felt so, yes.
***

CROSS EXAMINATION

Q (By Mr. Green) Officer Kluever, now you stated on direct examination that you stopped the defendant for having a headlight that was out, is that correct?

A That's correct, yes.

Q And I take it that you did not notice any weaving or other erratic driving conduct?

A No, I did not. No.

Q And you didn't notice if he was speeding?

A No. I'm sure he wasn't.

Q Now, is it fair to say that Mr. Chirpich when you stopped him was cooperative?

A Yes, he was cooperative.

14 - Q Polite.
15 - A Yes.
16 - Q And I note that when you say in your
16 - direct testimony
17 - that you noticed an odor of alcohol
17 - you didn't state
18 - that he appeared to be --- that he
18 - had a flushed face
19 - or bloodshot eyes so I take it that
19 - he did not?
20 - A No, I don't recall that he did, no.
21 - Q And his speech was not slurred,
21 - either, was it?
22 - A No. I don't recall it was.
23 - Q Now, you offered that walk-the-line
23 - test out at the ---
24 - the heel-to-toe test out on the
24 - Library alley, is that
25 - correct?

A That's correct, yes.
Q And you didn't have a line for him to walk, is that correct?
A That's correct. There was no line.
Q And there are no lights in that parking lot, are there? In that area.
A Well, there are lights on Main Street which we were just off of, but not in the parking lot there weren't any.
Q You're right down behind the Library, is that correct?
A Yes. Right behind the Library and just off of Main Street.
Q Now, the test that you gave you testified that the field

sobriety test that you have, you had him walking behind the Library in that alley and that you had him walk with his arms out, is that correct?

A That's correct, yes.

Q Now, I note that when you did the field sobriety test in the Law Enforcement Center you asked him to take those, did you not?

A That's correct, I did, yes.

Q That he did not have his arms out when he walked the line?

A No, he did not.

Q Now, it's not entirely accurate, is it, to say that you smelled alcohol?

---

***

2 - Q Was he cooperative?
3 - A He was cooperative with me, yes.
4 - Q How as his speech?
5 - A As near as I could tell it was normal
5 - because I had
6 - not observed the subject prior to ---
6 - or at any time.
7 - The subject was unknown to me prior to
7 - this one
8 - occasion.
9 - Q Did he appear to have any problem with
9 - his balance?
10 - A Not that I noted because he would have
10 - been standing in
11 - the room. I think I noted that he was
11 - leaning against
12 - the table or a cabinet at all times so
12 - I could not

detect that.

MS. FAIR: I have no further questions of this officer.

THE COURT: Mr. Green?

CROSS EXAMINATION

Q (By Mr. Green) Is it Sergeant or Captain Schweiss?

A Sergeant.

Q Sergeant Schweiss, you wrote a report concerning your observations of the defendant, did you not?

A Yes, I did.

Q And that report was completed either that night or the early morning or shortly thereafter, was it not?

A Yes, it was.

---

Q And in that report you noted --- have you had a chance to review your report?

A Yes.

Q So that you have read it over and in that report did you not note that Mr. Chirpich was very cooperative with me and gave two very good samples of his breath?

A Yes.

Q Is that accurate?

A Yes. I noted that on the Intoxilyzer test record also.

Q Right. And that you also stated I did not feel that he had too much of a problem at this time, is that correct?

A That was in reference to what?

13 - Q That sentence is, however, I did not
13 - feel that he had too
14 - much of a problem at this time?
15 - A I think that was in reference to his
15 - balance.
16 - Q To his balance?
17 - A Right.
18 - Q So he didn't look like he had a
18 - balance problem?
19 - A Right.
20 - Q So his appearance was normal, his
20 - speech was normal and
21 - his balance appeared to be normal?
22 - A Yes. As far as I could tell.
23 - Q Now, as to the blood alcohol
23 - concentration that you
24 - have talked to us about here this
24 - morning, this doesn't
25 - give the blood alcohol concentration
25 - at the time of the

---

1 - Q All right. Did you have an
1 - opportunity then to observe
2 - his physical condition?
3 - A Yes, I did.
4 - Q How did his face appear to you? The
4 - coloring on his
5 - face.
6 - A He looked to me like he always had.
6 - I noticed nothing
7 - different about him.
8 - Q How about his eyes?
9 - A They looked normal.
10 - Q And did you notice anything about his
10 - speech?
11 - A No, I didn't.
12 - Q How did his balance and coordination
12 - appear to you?
13 - A He seemed perfectly normal to me.
14 - Q When did you last see him that night?

---

15 - A I saw him --- I'm not sure what the
15 - time was, but I saw
16 - him for about 20 minutes and then he
16 - had gone to take a
17 - friend home.
18 - Q And that was who?
19 - A Dave Aske. And he told me that he
19 - was taking his friend
20 - home and that he would be back in a
20 - half hour and he
21 - wasn't back in a half an hour and
21 - in the meantime I
22 - had fallen asleep and he had come
22 - home a little later
23 - then.
***

appear to you?
A. Normal. He looked normal to me.
Q. Did you happen to notice anything about his balance or his speech or anything that might have indicated to you that he was under the influence?
A. I do not think Rick was under the influence of alcohol.
Q. Did you happen to see how he was driving?
A. I didn't really pay attention because I --- but I would pay attention if it was bad and it seemed fine at the time.
Q. Now, Mr. Aske, you have had occasion in your lifetime to see other people that are intoxicated,

12 - have you not?
13 - A Yes, I have.
14 - Q And you have actually used alcoholic
14 - beverages yourself?
15 - A Yes, I have.
16 - Q So do you know what it appears to be
16 - when someone looks
17 - to you to be intoxicated from alcohol?
18 - A Yes.
19 - Q Based upon what you saw of Rick that
19 - night and your own
20 - experience, do you have an opinion as
20 - to whether or not
21 - Rick was under the influence of
21 - alcohol at that time?
22 - A I don't think he was.
23 - Q Now, had you spent the evening with
23 - Rick?
24 - A Yes.
25 - Q And where had you been?

---

A I didn't small a thing. His face wasn't flushed or anything and his eyes weren't bloodshot. He stood normal too. He was standing the whole time and he wasn't like swaying back and forth or anything.

Q When you talked to Mr. Chirpich did he seem to be making sense when he spoke to you?

A Totally.

Q Now, you indicated --- I guess you got a little ahead of yourself, but that you were suprised by something?

A Right. My sister called me the next day and said Rick had got stopped and I thought --- it

kind of surprised me because I wasn't even aware that he was drinking.

Q Now, have you seen people that are intoxicated with alcohol?

A Yes, I have.

Q And have you ever consumed alcoholic beverages yourself?

A Yes, I have.

Q And based upon your own personal experiences and observations and what you saw of Rick that night, do you have an opinion as to whether he was under the influence of an alcoholic beverage?

A I would say no. I had not idea that he had been drinking.

---

23 - Didn't smell a thing. And by the way
23 - he was talking
24 - he wasn't stuttering or anything or
24 - slurring his speech
25 - or swaying.

---

1 - A No.
2 - Q And we saw on the videotape the
2 - officer demonstrating
3 - to you how to walke the line and that
3 - was at the Law
4 - Enforcement Center later?
5 - A Yes.
6 - Q How did he show you to walk the line
6 - in that dark alley?
7 - A He just said --- he didn't really put
7 - out his arms all
8 - the way. Just said put your arms out
8 - like this and . . .
9 - Q That is holding your arms out to the
9 - side?
10 - A Yes. And he said walk in an imaginary
10 - line and I
11 - suppose it was probably about eight
11 - feet or so.

---

12 - Q Did he show you where this imaginary
12 - line was?
13 - A Well, he kind of pointed with his
13 - finger. He just ---
14 - like, you know, right along there.
15 - Q And did he do like he did at the
15 - police station?
16 - A No. No, he didn't have his arms out
16 - fully. He
17 - didn't demonstrate. He didn't walk it
17 - himself. He
18 - just told me what to do. He just said
18 - to walk this
19 - imaginary line.
20 - Q How did you feel you did walking on
20 - that line?
21- A I did --- I thought I did better there
21 - than I did on
22 - the film. Personally. Because when I

---

got stopped I
didn't think --- I didn't even think, you know, that
I --- it would even come up about being over the limit.
So I wasn't worried about being supposedly intoxicated

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***

Mr. Green:

7 - below .10. There is no way of knowing.
7 - Now to get
8 - back to the Sub E charge, this statute
8 - is a real
9 - puzzle to me, Your Honor, as far as I
9 - can see it
10 - allows a conviction for DWI when in
10 - situations where
11 - there is no impaired driving. For
11 - instance if someone
12 - imbibes alcoholic beverages and because
12 - of his bodily
13 - state and content of his stomach the
13 - absorption does
14 - not occur for half an hour, but he
14 - imbibes enough to
15 - eventually push the blood alcohol
15 - level up to over

16 - .10, but before it is absorbed he drives
16 - and then
17 - within two hours after the driving
17 - conduct is tested
18 - and is found to be over .10, he's guilty
18 - of driving
19 - while intoxicated.
20 - But the fact is that because the
20 - alcohol had
21 - not entered his blood system and
21 - impaired his facilities
22 - there is no way that the driving would
22 - be impaired as
23 - a matter of fact. So what the statute
23 - does is it
24 - shifts to the defense the burden of
24 - proof. All that
25 - the prosecution has to prove is driving
25 - which in this

case is admitted and a test result within two hours. There is no requirement for establishing a rational nexus between the test and the driving conduct. And that's what we're talking about here. We're talking about driving while under the influence. And that statute simply covers more instances than the statute is designed to or than the whole law is designed to cover.

What the law is designed to do is to make it illegal to drive while you are impaired. Now in shifting what it allows the prosecution to do

is shift to the defense the burden of going forward with the evidence and creates a presumption that if you are .10 within two hours of driving you must have been impaired while you are driving. It's a presumption that just can't be allowed in a criminal case. So we would ask, Your Honor, that that portion of the charge be ruled --- that it should not go to the jury. There is absolutely no evidence here to show, based on what the prosecution has presented today, that my client was operating that motor vehicle while

he was under the
influence. Not as charged. And to
allow this to go
forward on that, on the Sub E charge
where the prose-
cution is given the benefit of an
unspoken presumption
that if those two things are shown he
must have been

under the influence, that's impermissible under our constitution and our system of criminal justice and we would ask that that be stricken. It has to have some logical connection to driving while under the influence. It has to, for instance I could see the case where if the jury convicted him of over .10 at the time of driving, that would make sense. Or if they found the Sub A charge and convicted him of that it would make sense to convict him of the Sub E charge because there is a rational connection. There are facts

11 - that tie that test result to the time of
11 - driving. But
12 - here we have this Sub E charge sitting
12 - out there just
13 - by itself. There's a test and there is
13 - nothing to
14 - connect it with driving. There is no
14 - testimony of
15 - any bad driving conduct. Even the
15 - police --- even
16 - Sergeant Schweiss says he appeared
16 - normal. So it's a
17 - pure test in this case of whether or
17 - not that Sub E,
18 - Sub Section really is a just law and
18 - really is per-
19 - missible under our system of
19 - constitutional law.
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Ms. Fair:

11 - As to the motion to not submit the
11 - Subdivision
12 - E charge to the jury, off the top of
12 - my head I don't
13 - have a whole lot of argument. Except
13 - that the law is
14 - presently on the books and the City has
14 - a right to
15 - proceed under this Subsection. The law
15 - is presumed
16 - to be constitutional. And we would
16 - proceed under that
17 - law, Your Honor, until there is a
17 - ruling that the law
18 - is in fact not constitutional.

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The Court:

As to County I E, I think that issue should have been brought up at the time of the omnibus hearing, but even so I don't believe that it is a presumption in the law. The legislature can define what acts are criminal in this case and the State --- and they have doen so by saying that it is a misdemeanor for any person to drive, operate or be in physical control of any motor vehicle within the state when the person's

alcohol concentration as measured within two hours of the time of driving is .10 or more. They have declared such an act to be a criminal act. And I guess the argument should be made to the legislature. I don't at this point in time would not rule that that statute is unconstitutional and therefore will deny the defendant's motion as to I E. I find nothing in the statute under which the defendant is charged with violating that requires the prosecution to prove impairment. Although it is obviously a symptom or one of those facts that

would lead one to conclude that one might be under the influence of an intoxicating beverage. If there is impaired driving. But the statute provides that it is a misdemeanor to drive, operate or be in physical control of a motor vehicle when the person is under the influence of alcohol. And I believe the instructions do define these terms sufficiently for the jury to apply them to the facts that have been set forth on behalf of the parties. So the defendant's motions are denied. Are we ready then?

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STATE OF MINNESOTA

IN SUPREME COURT

C7-85-2248

State of Minnesota, City of Mankato,

Respondent,

vs.

Richard Anthony Chirpich,

Appellant.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Richard Anthony Chirpich for further review be, and the same is, denied.

Dated: 10-17-86

BY THE COURT:

_____

Chief Justice

STATE OF MINNESOTA

IN COURT OF APPEALS

C7-85-2248

Blue Earth County — Randall, Judge

State of Minnesota,
City of Mankato,

Respondent,

Hubert H. Humphrey, III
Attorney General
200 Ford Building
117 University Avenue
St. Paul, MN 55155

Michael J. McCauley
Mankato City Attorney
Patricia Fair
Asst. City Attorney
202 East Jackson Street
P.O. Box 3368
Mankato, MN 56001

vs.

Richard Anthony Chirpich,

Appellant.

Kevin O'Connor Green
Green Law Offices, P.A.
229 South Front Street
P.O. Box 3044
Mankato, MN 56002-3044

Filed August 12, 1986
Wayne Tschimperle, Clerk
Minnesota Appellate Courts

S Y L L A B U S

Appellant did not properly raise the issue of the constitutionality of Minn. Stat. section 169.121, subd. 1(e) (1984).

Affirmed

## O P I N I O N

RANDALL, Judge

Appellant Richard Anthony Chirpich was charged with a gross misdemeanor under Minn. Stat. section 169.121, subd. 3(a) (1984). To simplify the issue of enchancement, both counsel agreed to try the case to the jury on misdemeanor DWI pursuant to an agreement that conviction would automatically become a gross misdemeanor if the jury found appellant guilty.

Appellant was also charged with three separate subdivisions of the Minnesota Statutes on DWI, Minn. Stat. section 169.121, subds. 1(a), 1(d), and 1(e) (1984). The jury acquitted appellant on subdivision 1(a) and 1(d) but found him guilty of violating subdivision 1(e). On appeal, appellant claims Minn. Stat. 169.121, subd. 1(e) is unconstitutional. The trial court found that appellant had not timely raised the constitutionality issue, but then went on to

decide that issue on the merits in favor of the statute. We affirm the trial court's finding that the issue of the constitutionality of section 169.121, subd. 1(e) was not timely raised. We will review the merits of the constitutional issue as the trial court did, but our affirmance on the question of timeliness is dispositive. We affirm.

FACTS

Appellant was stopped at 2:10 a.m. on March 13, 1985, for having a burned our headlight. After observing several indicia of intoxication, the officer had appellant perform certain field

sobriety tests which appellant failed. The officer administered a preliminary breath test which appellant also failed. Appellant was arrested for DWI. A subsequent Intoxilyzer test revealed appellant had an alcohol concentration of .12. Appellant was charged with violating Minn. Stat. section 169.121, subd. 1(a), (d), and (e).[1] Prior to trial, appellant timely moved to suppress certain evidence. However, he did not challenge the constitutionality of the DWI statute as it pertains to section 169.121, subd. 1(e). Prior to trial, appellant raised and the court resolved a Nyflot issue which is not at issue here.

The trial court submitted all three subdivisions to the jury. The jury acquitted appellant of the charge of violating section 169.121, subd. 1(a) and 1(d), but found him guilty of violating subdivision 1(e).

In his motion for a new trial, appellant argued that, based on this perverse jury

verdict, he was entitled to a new trial in the interests of justice, that errors of law had occurred, and that section 169.121, subd. 1(e) is unconstitutional as applied. After the hearing on appellant's motion for a new trial, the

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1. Minn. Stat. section 169.121, subd. 1(a) prohibits driving while under the influence.
Minn. Stat. section 169.121, subd. 1(d) prohibits driving when alcohol concentration is .10 or more. Under this subdivision, the driver's ability to adequately handle the car is not the issue, just the test.
Minn. stat. section 169.121, subd. 1(e) expands on subdivision 1(d), making it a crime to drive when the driver's alcohol concentration as measured within two hours of the time of driving is .10 or more.

court requested written memorandums from counsel on the issue of constitutionality. Appellant argued, among other things, that section 169.121, subd. 1(e) makes innocent activity illegal, impermissibly shifts the burden of proof to a defendant, and by its working (relative to a driver's alcohol concentration "as measured within two hours of the time of driving") acts as an irrebuttable presumption of guilt by presuming that a defendant with .10 concentration within two hours after driving must have been .10 while driving. Appellant argues that the only possible presumption in a criminal case is the presumption of innocence. Thus section 169.121, subd. 1(e) violates a defendant's due process rights.

The trial court first ruled that appellant's constitutionality argument was untimely raised, and then held that, even if it had been raised properly, it lacked merit. This appeal followed.

## ISSUE

Has appellant waived his right to challenge the constitutionality of Minn. Stat. section 169.121, subd. 1(e) by failing to raise the issue prior to trial?

## ANALYSIS

### Waiver of Constitutionality Challenge

Appellant did not challenge the constitutionality of section 169.121, subd. 1(e) in any pretrial proceeding. In its ruling following the new trial hearing, the trial court concluded that appellant had waived the issue by not raising it before trial. We agree.

Under Minnesota Rules of Criminal Procedure 10.01, 10.02, and 10.03, a challenge to constitutionality, being capable of determination without a trial on the merits, must be timely asserted before trial. We note that the trial court did not find good cause to relieve appellant from the sanction of untimeliness.

Appellant makes the general claim that since he had raised a Nyflot issue prior to trial, he had put the State on general notice of constitutional questions. We do not agree. The Nyflot issue was not related to Minn. Stat. section 169.121, subd. 1(e). To properly challenge a criminal statute on the grounds that it is unconstitutional, a specific pre-trial notice to the court and counsel must be given. We hold that the trial court did not abuse its descretion in ruling that appellant's challenge on constitutional grounds was untimely. Since the trial court went on to rule on the merits of appellant's

constitutional challenge, we will briefly discuss the merits of the issue raised by appellant.

Appellant argues that Minn. Stat. section 169.121, subd. 1(e) violates his right to due process because it is overly broad. A statute is overbroad when it sweeps too far and regulates permissible conduct. State v. Andersen, 370 N.W.2d 653, 661 (Minn. Ct. App. 1985), citing Broadrick v. Oklahoma, 413 U.S. 601, 607 (1973). "In facial challenge to the overbreath and vagueness of a law, a court's first task is to determine whether

the enactment reaches a substantial amount of constitutionally protected conduct." Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494 (1982).

Minn. Stat. section 169.121, subd. 1(e) states:

> It is a misdemeanor for any person to drive, operate or be in physical control of any motor vehicle within this state:
> ***
>
> (e) When the person's alcohol concentration as measured within two hours of the time of driving is 0.10 or more.

The State has a legitimate interest in enacting DWI laws. Appellant cites no authority for the proposition that driving while under the influence of alcohol is constitutionally protected conduct. No court has ever so found. We hold that the statute is not constitutionally overbroad.

The claim that the statute is void for vagueness is without merit. The language of the statute applies to appellant's conduct. Coates v. City of Cincinnati, 402 U.S. 611,

614 (1971). See Parker v. Levy, 417 U.S. 733, 756 (1974).

Appellant claims that Minn. Stat. section 169.121, subd. 1(e) acts as an irrebuttable presumption of guilt and impermissibly shifts the burden of proof to the defendant to show that if he was .10 or more within two hours of driving, that he was not .10 or more at the time of driving. The legislature has the authority to define the elements of the crime of driving while intoxicated. State v. Mathiasen, 273 Minn. 372, 141 N.W.2d 805 (1966).

The legislature added subdivision 1(e) to section 169.121 in 1984, and it is not our duty to question whether or not subdivision 1(e) was needed. The need for a criminal statute is up to the legislature.

Under Minn. Stat. section 169.121, subd. 1(e), the State still must prove beyond a reasonable doubt that the blood alcohol concentration was .10 or more. Of necessity, juries understand that blood alcohol tests are not take the instant a driver is stopped and exits the car. By definition, there must be a time lag while the driver is first investigated at roadside and then later transported to an appropriate facility where blood alcohol concentration can be determined. Expert testimony is available to both sides, if needed, on the effects of alcohol in the blood over a period of time. There is no impermissible burden shift to the defendant in a prosecution under subdivision 1(e). Contrary to appellant's argument, no

presumption of guilt is involved. County of Court of Ulster County v. Allen, 442 U.S. 140, 156-57 (1979). See Francis v. Franklin, ___ U.S. ___, 105 S.Ct. 1965 (1985).

D E C I S I O N

The trial court did not err in holding that appellant had waived his right to challenge the constitutionality of Minn. Stat. section 169.121, subd. 1(e).

Affirmed.

STATE OF MINNESOTA

Supreme Court

Court of Appeals

State of Minnesota,
City of Mankato,
Respondent,

JUDGMENT

vs.

C7-85-2248
Appellate Court Case Number

Richard Anthony
Chirpich,
Appellant.

K68562
Trial Court Case Number

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order of the Court below, herein appealed from, to wit, of the County Court within and for the County of Blue Earth be and the same hereby is affirmed and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is herein transmitted and made part of the remittitur.

Dated and signed: FOR THE COURT

November 3, 1986

Wayne Tschimperle
Clerk of the Appellate Courts

By:
Assistant Clerk

STATE OF MINNESOTA

Supreme Court

Court of Appeals

TRANSCRIPT OF JUDGMENT

I, Wayne Tschimperle, Clerk of the Appellate Courts, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my signature at the State Capitol, in the City of St. Paul

November 3, 1986
Dated

Wayne Tschimperle
Clerk of the Appellate Courts

By:
Assistant Clerk